MOK SHIAU PING v. LAI KOK MING; PUBLIC BANK BHD (ORANG-ORANG YANG DIGARNIS)

HIGH COURT MALAYA, KUALA LUMPUR
GAN TECHIONG JC
[CIVIL APPEAL NO: WA-12ANCVC-129-07-2024]
5 NOVEMBER 2024

Abstract – *The law ought to be interpreted to require leave of court to levy execution, including by way of garnishee proceedings, where six years or more have lapsed since the date of the judgment or order.*

CIVIL PROCEDURE: *Judgments and orders – Garnishee order – Execution – Failure to obtain leave of court to levy execution on judgment – Whether garnishee proceedings subjected to requirement for leave of court after six years – Rules of Court 2012, O. 45, O. 46 & O. 49*

CIVIL PROCEDURE: *Proceedings – Garnishee proceedings – Commencement – Failure to obtain leave of court to levy execution on judgment – Whether garnishee proceedings subjected to requirement for leave of court after six years – Rules of Court 2012, O. 45, O. 46 & O. 49*

The plaintiff ('respondent') obtained a judgment against the defendant ('appellant') on 7 November 2012 ('judgment'). Thereafter, the respondent did not serve sealed copies of the said judgment and/or High Court order on the appellant. After 11 years, on 7 May 2024, the respondent filed an application for a garnishee order to execute the said judgment without applying for leave of court. The Sessions Court Judge ('SCJ') issued a garnishee order *nisi* to garnish the appellant's money in several banks, and it managed to garnish his money in Public Bank Berhad. Even though there was an application filed by the appellant to set aside the garnishee order *nisi* on the ground of failure by the respondent to obtain leave of court to levy execution on the said judgment, which was more than six years old, the SCJ decided to make the garnishee order *nisi* absolute. Hence, the appellant appealed. The appellant submitted, *inter alia*, that O. 46 r. 2(1) of the Rules of Court 2012 ('ROC') requires leave to be obtained first before any judgment or order could be enforced, and by virtue of the wording of O. 45 r. 13(1), O. 46 r. 2(1)(a) was applicable to garnishee applications. The respondent, however, took the position that garnishee proceedings were not subjected to the requirement for leave even after six years because O. 46 r. 1 did not include a garnishee order in the definition of 'writ of execution'. The respondent further emphasised that garnishee proceedings were governed by O. 49 of the ROC, and not covered by O. 45 or O. 46. The main issue was whether leave of court was required by the respondent prior to applying for a garnishee order.

Held (allowing appeal; setting aside order of Sessions Court):

(1) The law ought to be interpreted to require leave of court to levy execution, including by way of garnishee proceedings, where six years or more have lapsed since the date of the judgment or order. (para 31)

(2) Garnishee proceedings are specifically mentioned in the main rule on execution of judgments in the ROC, which is O. 45. Even though the procedure for an application for garnishee is set out in O. 49, O. 45 r. 13 specifically states that O. 46 to O. 51 are applicable in relation to an order for recovery of money as they apply for the payment of money. Even though O. 45 r. 13 alone does not justify including garnishee proceedings as requiring leave if more than six years had elapsed after the issuance of the judgment, it does express the intention of the Rules Committee for O. 46 to O. 51 – which includes O. 49 on garnishee proceedings – to be read together when it comes to execution of judgments or orders. (paras 32-34)

(3) Applying the case of *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* analogously to garnishee proceedings, leave of court ought to be required for garnishee proceedings to be commenced in respect of judgments that are more than six years old because the respondent should be in a position to enforce execution of a judgment. The case for holding that leave is required for garnishee proceedings is strong because O. 49 is part of the set of rules within the ROC that deal with execution proceedings (starting with O. 45). (paras 43 & 44)

(4) The rules of court must be consistent. Otherwise, an incongruous and anomalous situation could arise whereby a plaintiff, whose application for leave to apply for a writ of seizure and sale after six years had been dismissed by the court for failing to provide sufficient reason, would be at liberty to obtain a garnishee order without requiring leave of court to do so. (para 45)

Case(s) referred to:

Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim [2003] 1 CLJ 826 CA ***(refd)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 FC ***(refd)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Societe Eram Shipping Co Ltd v. Compagnie Internationale De Navigation [2003] 3 All ER 465 ***(refd)***

Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors [1994] 4 CLJ 959 SC ***(dist)***

Legislation referred to:

Rules of Court 2012, O. 45 r. 1(1)(b), 13(1), O. 46 rr. 1, 2(1)(a), (2), O. 47, O. 48, O. 49, O. 51

For the appellant - Eolanda Yeo Jin Huay; M/s Cheang & Ariff
For the respondent - Lai Zhe Jun; M/s SS Ng & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Gan Techiong JC:

Introduction

[1] Does a plaintiff require leave of court to commence garnishee proceedings to execute a judgment that was issued more than six years earlier? The whole appeal pivoted on this question of law because the respondent/plaintiff had filed an application on 7 May 2024 for a garnishee order to execute a judgment dated 7 November 2012, without applying for leave of court. 11 years and six months had elapsed between those two dates.

[2] The respondent/plaintiff takes the position that leave of court is not required to apply for a garnishee order to execute a judgment that is older than six years. If the respondent's position is correct, an incongruous and anomalous situation could arise. It is this: a plaintiff, whose application for leave to apply for a writ of seizure and sale has been dismissed by the court, can 'thumb his nose' at the court and apply for a garnishee order even if 11 years and 11 months had elapsed after the issuance of the judgment, without having to apply for leave of court.

[3] Whilst there is no doubt that leave of court must be obtained first before a plaintiff may apply for one of the writs of execution if a judgment is more than six years old, the legal position is unclear regarding an application for a garnishee order and it is arguable whether leave is required.

[4] I agree with submissions for the appellant that several rules of court were probably not highlighted for the attention of the Supreme Court that decided *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors* [1994] 4 CLJ 959; [1995] 1 MLJ 1 – a case which facts are distinguishable. Further, there is a more recent judgment of the Federal Court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1 which lends support to the appellant's submissions – though not directly on point.

[5] Thus, my humble view is that a definitive judgment of the Court of Appeal and/or Federal Court on the said question of law would be most useful to provide guidance based on the current Rules of Court 2012. For that reason, immediately after allowing the appellant/defendant's appeal with no order as to costs, I had in open court encouraged learned counsel for the respondent/plaintiff to apply for leave to appeal to the Court of Appeal against the decision of this court.

Background Facts

[6] Judgment was obtained by the respondent/plaintiff against the appellant/defendant on 7 November 2012 ("the said judgment"). On appeal, the High Court affirmed the decision of the Sessions Court on 12 June 2013. Thereafter, the respondent/plaintiff did not serve sealed copies of the said judgment and/or High Court order on the appellant/defendant.

[7] Those orders became available to the appellant only in June 2024 when exhibited in an affidavit filed in support of the garnishee proceedings and served on the appellant on 7 June 2024.

[8] The judgment sum was only RM48,100 but the years of delay by the respondent/plaintiff, in serving the sealed judgment and in executing it, had caused the total sum payable, with interest for a period of six years, to balloon to RM69,276.72 (inclusive of costs of RM 4,659). RM69,276.72 is the amount garnished in the appellant's bank account with Public Bank Berhad.

[9] After 11 years, in May 2024, the respondent suddenly awoke from his 'slumber' and instructed solicitors to execute on the said judgment but as mentioned above, without first serving sealed copies of the said judgment on the appellant.

[10] As highlighted above, the respondent filed an application on 7 May 2024 for a garnishee order to execute the said judgment without applying for leave of court.

[11] On 23 May 2024, the learned Sessions Court Judge issued a garnishee order *nisi* to garnish the appellant's money in several banks, and it managed to garnish his money in Public Bank Berhad. Even though there was an application filed by the appellant to set aside the garnishee order *nisi* on the ground of failure by the respondent/plaintiff to obtain leave of court to levy execution on the said judgment which is more than six years old, the learned Sessions Court Judge decided to make the garnishee order *nisi* absolute.

[12] There was a preliminary objection raised by the respondent at the Sessions Court about the capacity of Messrs Ling & Mok to represent the appellant/defendant.

The Appellant/Defendant's Position

[13] In support of the appeal, learned counsel for the appellant relied on O. 45 r. 1(1), 13(1) and O. 46 rr. 2(1)(a) of the Rules of Court 2012 and several authorities.

[14] On O. 45, it was submitted it is the fundamental rule governing the enforcement of any judgment and order under the Rules of Court 2012.

[15] It was pointed out that garnishee proceedings are specifically mentioned in sub-para. (b) of O. 45 r. 1(1), which reads as follows:

> (1) Subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by one or more of the following means:
>
> (a) a writ of seizure and sale;
>
> (b) garnishee proceedings;
>
> (c) in a case in which rule 5 applies, an order of committal.

[16] Learned counsel went on to draw this court's attention to O. 45 r. 13(1) which states that O. 45 r. 1(1) and O. 46 to 51 are applicable to recovery of money but not applicable to r. 1(1)(c) which is for a committal order. Order 45 r. 13(1) reads as follows:

> **13. Enforcement of judgments and orders for recovery of money (O. 45 r. 13)**
>
> (1) Rule 1(1), except for subparagraph (c), and Orders 46 to 51 shall apply in relation to a judgment or order for the recovery of money as they apply in relation to a judgment or order for the payment of money.

[17] Counsel then went on to submit that O. 46 r. 2(1)(a) requires leave to be obtained first before any judgment or order can be enforced, and by virtue of the wording of O. 45 r. 13(1), she submits that O. 46 r. 2(1)(a) is applicable to garnishee applications. Order 46 r. 2(1)(a) reads:

[18] It was reiterated in counsel's submissions that the criteria set out under O. 46 would apply to garnishee applications "as necessitated by O. 45 r. 1(1) and O. 45 r. 13(1)".

[19] It was further submitted that O. 46 r. 2(2) also provides that other rules may also require leave to be obtained before enforcement of a judgment of order, not just for a writ of execution. That rule reads:

> (2) Paragraph (1) is without prejudice to any written law or rule by which a person is required to obtain the leave of the Court for the issue of a writ of execution or to proceed to execution on or otherwise the enforcement of a judgment or order.

[20] Learned counsel sought to rely on *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561; [2015] 4 MLJ 1, wherein the Federal Court had held that in order to commence bankruptcy proceedings pursuant to a judgment or order that has been issued for more than six years, the applicant must be a person "who is entitled to enforce a final judgment without prior leave of court" even though the Bankruptcy Rules 1969 does not specifically state that O. 46 r. 2(1) Rules of Court 2012 is applicable to the said Bankruptcy Rules.

[21] Lastly, counsel submitted that the determination of who is a person "entitled to enforce a final judgment without prior leave of court" would be based on the provisions of the Rules of Court 2012, namely O. 45, which has the heading: "Enforcement of Judgment and Order".

The Respondent/Plaintiff's Position

[22] As mentioned at the outset above, the respondent's learned counsel takes the position that garnishee proceedings are not subjected to the requirement for leave even after six years because O. 46 r. 1 does not include a garnishee order in the definition of "writ of execution". Order 46 r. 1 reads:

A In this Order, unless the context otherwise requires, "writ of execution" includes a writ of seizure and sale, a writ of possession and a writ of delivery.

[23] Learned counsel highlighted that O. 46 r. 2(1) (see para. [18] above) uses the term "writ of execution", which he submitted must be as defined B in r. 1 to "include a writ of seizure and sale, a writ of possession and a writ of delivery." The gist of his submissions is that only these three writs are defined as "writ of execution".

[24] It was further emphasised by learned counsel for the respondent that garnishee proceedings are governed by O. 49 Rules of Court 2012, and not C covered by O. 45 or O. 46.

[25] Learned counsel went on to rely on *Tai Kwong Goldsmiths & Jewellers (Under Receivership) v. Yap Kooi Hee* (*supra*) to submit that leave of court is not required for the respondent/plaintiff to apply for a garnishee order 11 years after the date of the said judgment. He relied on the following passage: D

> Order 46 of the Rules of the High Court 1980 ('the RHC') deals with writs of execution where leave has to be obtained before the writ may issue. Although O. 46 r. 2(1) of the RHC conspicuously and specifically omitted to include *garnishee proceedings, these proceedings, which no doubt in a sense are a form of execution proceeding, however, come under O. 49 of the RHC and have* E *no place in O. 46. Accordingly, nothing turns on the omission to include garnishee proceedings in the list of cases set out in O. 46 r. 2(1).* (emphasis added)

Analysis Of The Law

[26] First, with respect, the preliminary objection is truly a technical F objection which would make no difference whatsoever to the final outcome. The main issue is – as outlined at the outset above – simply whether leave of court is required by the respondent/plaintiff prior to applying for a garnishee order.

[27] Order 46 r. 2(1)(a) states that leave of court is required to issue a writ G of execution to enforce a judgment or order where six years or more have lapsed since the date of the judgment or order. Such a requirement for leave is obviously to require indolent plaintiffs to provide valid reasons for having delayed execution beyond six years, and to give the court a discretion to refuse leave if the plaintiff comes up with implausible reasons.

H **[28]** Arifin Zakaria JCA (as the now retired Chief Justice then was) in *Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim* [2003] 1 CLJ 826 emphasised that an application for leave under O. 46 r. 2(1) must be supported by an affidavit stating the reasons for the delay in enforcing the judgment or order. The appeal was dismissed because the reason given was the alleged I negligence of the appellant's solicitors to act timeously. The following passages are relevant:

> It is trite that the grant of leave under O. 46 r. 2 is in the court's discretion. Order 46 r. 3 states that an application under O. 46 r. 2(1) must be supported by an affidavit stating, when the case falls within r. 2(1)(a), *the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case. It is not possible for this court to provide an exhaustive list of what is considered to be sufficient reason.*
>
> We agree with the learned judge that *in an application under O. 46 r. 2 it is incumbent for the applicant to furnish sufficient reason to explain for their inaction.* From the supporting affidavit the only reason put forth by the appellant in support of this application is the neglect of its former solicitors to initiate the necessary action. (emphasis added)

[29] If the respondent's interpretation of the law is correct, it means that plaintiffs who have obtained a final judgment for payment of money may 'sleep on it' for 11 years and 11 months before instructing solicitors to apply for a garnishee order against the defendant.

[30] Whilst O. 46 r. 2 is unequivocal in stating that leave of court is required where six years or more have lapsed since the date of the judgment or order, there is no specific mention of 'garnishee order' in that said rule – leaving it open to judgment creditors, as in this case, to argue that the omission means that leave is not required even after six long years.

[31] After reading all the authorities, I am of the view that the law ought to be interpreted to require leave of court to levy execution, including by way of garnishee proceedings, where six years or more have lapsed since the date of the judgment or order.

[32] First, garnishee proceedings are specifically mentioned in the main rule on execution of judgments in the Rules of Court 2012, which is O. 45. It is specifically stated in O. 45 r. 1(b):

> (1) Subject to the provisions of these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means:
>
> (a) a writ of seizure and sale;
>
> (b) garnishee proceedings;

[33] Even though the procedure for an application for garnishee is set out in O. 49, O. 45 r. 13 specifically states that O. 46 to O. 51 are applicable in relation to an order for recovery of money as they apply for the payment of money. It reads:

> Rule 1(1), except for subparagraph (c), and Orders 46 to 51 shall apply in relation to a judgment or order for the recovery of money as they apply in relation to a judgment or order for the payment of money.

[34] Even though O. 45 r. 13 alone does not justify including garnishee proceedings as requiring leave if more than six years have elapsed after the issuance of the judgment, it does express the intention of the Rules Committee for O. 46 to O. 51 – which includes O. 49 on garnishee proceedings – to be read together when it comes to execution of judgments or orders.

[35] In *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787, Hamid Mohamad FCJ (as he then was) pointed out the differences between execution proceedings under the Rules of Court and bankruptcy proceedings. That is in the following passage from His Lordship's judgment:

> A question then may be asked: on the same reasoning, is an "execution" not a "proceeding in court"? Of course, it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, **the focus being the judgment debtor, not the debt** and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. … (emphasis added)

[36] It could be gleaned from the above passage – which is a judgment of the Federal Court – that execution under the Rules of the High Court 1980 (in *pari materia* with our current Rules of Court 2012) are the continuation of existing proceedings following the issuance of a judgment under the same set of rules because the focus is on the subject matter of the judgment to be recovered, whereas in bankruptcy proceedings, the subject matter is the judgment debtor and not the debt, and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the debtor's status into that of a bankrupt.

[37] By applying the reasoning of the Federal Court in *Perwira Affin Bank Bhd v. Lim Ah Hee* (*supra*), it is logical to conclude that garnishee proceedings are merely the continuation of existing proceedings following the issuance of a judgment because an application for a garnishee order is for the purpose of execution of a judgment under the same set of rules, *ie*, the Rules of Court 2012, and the focus is on the money to be recovered for a successful plaintiff and not to change the status of a defendant into that of a bankrupt.

[38] The mechanism of garnishment is actually similar to that of a writ of execution which is enforced by seizing a property belonging to a defendant/judgment debtor and transferring the property or its sales proceeds to the plaintiff/judgment creditor. When a garnishee order is issued, it serves to freeze money belonging to the defendant/judgment debtor that is in the hands of the third party (the garnishee), and likewise to have it transferred into the hands of the plaintiff/judgment creditor. The fundamental principle of a

garnishment mechanism is succinctly explained by Lord Bingham at the House of Lords in *Societe Eram Shipping Co Ltd v. Compagnie Internationale De Navigation* [2003] 3 All ER 465 in the following passage:

> [24] To resolve the issues arising between the judgment creditor and the third party in this appeal it is in my opinion necessary to return to very basic first principles. *A garnishee or third party debt order is a proprietary remedy which operates by way of attachment against the property of the judgment debtor. The property of the judgment debtor so attached is the chose in action represented by the debt of the third party or garnishee to the judgment debtor.* On the making of the interim or nisi order *that chose in action is (as it has been variously put) bound, frozen, attached or charged in the hands of the third party or garnishee.* … When a final or absolute order is made the third party or garnishee is obliged (subject to any specified monetary limit) to make payment to the judgment creditor and not to the judgment debtor, but the debt of the third party to the judgment debtor is discharged *pro tanto*.
>
> (emphasis added)

[39] The judgment of the Supreme Court in *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee* (*supra*) may be distinguished by the facts of that case. There, the main issue was whether leave of court is required for an action or proceedings to be commenced against a receiver who is appointed by the court. This is evident from the summary of that judgment, as follows:

> Held, allowing the receiver's appeal:
>
> (1) A court-appointed receiver is an officer of the court and any interference with him or with property under his control constitutes a contempt of court. Therefore, nobody can bring any action or proceedings against a receiver in his capacity as such, including execution proceedings which include garnishee proceedings, whether or not misconduct of the receiver is in issue, without leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained.

[40] Order 46 was mentioned in *Tai Kwong Goldsmiths* (*supra*) because the Supreme Court was of the view that the learned High Court Judge had erred, *inter alia*, in referring to that rule in deciding whether leave is required to sue a receiver appointed by the court. This can be seen in the following passages:

> The learned judge sought to find support for the view he had taken from the fact that O. 46 r. 2(1) of the Rules of High Court 1980 ('the RHC') sets out the instances in which a writ of execution may not issue without leave and by seeing some significance in that the rule 'conspicuously and specifically omitted to include garnishee proceedings'.
>
> *We would, accordingly and with respect, disagree with the learned judge's suggestion* that *Zainal Abidin Putih v. Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 does not apply and *would reiterate that there is a general principle of wide application that interference with persons having duties to perform in or at the instance of a court of justice amounts to contempt of court.* And stemming from

A that principle, we lay down, in the context of the issues raised in this appeal, that the *court will not permit a receiver appointed by its authority and who is therefore its officer, to be interfered with, without leave.* In elaboration (but without retrogating the effect of the rule) *we further lay down that nobody can bring any action or proceedings against a receiver, in his capacity as such, including execution proceedings* which include garnishee proceedings, whether
B the misconduct of the receiver is in issue or not, without the leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained. (emphasis added)

[41] Even though leave of court is not stipulated in the Bankruptcy Rules, the Federal Court in *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB*
C *Bank Bhd* (*supra*) expressed its disagreement with the proposition that leave of court is not required to commence bankruptcy proceedings based on a judgment that is more than six years old, as is shown in the following passage:

[61] We are ever mindful that *Tan Tem Son* is a recent decision of this court. But *Tan Tem Son* had clearly departed from history and case law.
D We see no alternative but to put it back to where it was, in line with other jurisdictions with a provision equipollent to s. 3(1)(i) of the BA 1967.

[62] With respect, we could *not* subscribe to the reasoning in *Tan Tem Son.* Also, *we could not agree that* 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s. 3(1)(i) of the Bankruptcy
E Act 1967 *does not require a judgment creditor to obtain leave* pursuant to *O. 46 r. 2(1)(a)* of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding *based on a final judgment which has been obtained more than six years ago.* Rather, we hold that any person who is for the time being entitled to enforce a final judgment in the proviso to s. 3(1)(i) of the BA 1967 must be a person who is entitled to enforce a final judgment
F without prior leave of court. In the instant case, judgment was obtained on 10 October 2000. *When the BN was issued on 3 January 2011, the judgment was more than six years old. In other words, when the BN was issued, the respondent was not in a position to execute the judgment without the leave of court.* Leave should and could have been obtained (see *ex parte Clements* [1901] 1 QB 260, at p 263). In that it was not, such that *the respondent was then not in*
G *a position to execute the judgment, the respondent was not entitled to issue the BN.* (emphasis added)

[42] The Federal Court went on to conclude that leave is required for execution of a judgment after more than six years have lapsed. This ruling was made even though there is nothing in the Bankruptcy Rules that mention
H leave being required in such a situation. This ruling of the Federal Court is in the following passage:

[63] By reason of the aforesaid, our answer to the first leave question is in the positive, that is to say that *a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed from the date of the*
I *judgment, must obtain the prior leave of court pursuant to O. 46 r. 2 of the RHC, now replaced by O. 46 r. 2 of the Rules of Court 2012.*

[43] Applying *Dr Shamsul Bahar Abdul Kadir* (*supra*) analogously to garnishee proceedings, leave of court ought to be required for garnishee proceedings to be commenced in respect of judgments that are more than six years old because the respondent should be in a position to enforce execution of a judgment. Whilst it is true that leave is not expressly mentioned in O. 49, leave is also not expressly mentioned in the Bankruptcy Rules. The Federal Court has effectively regarded 'writ of execution' in O. 46 r. 2(1) as covering all forms of enforcement of judgment and order.

[44] The case for holding that leave is required for garnishee proceedings is stronger than for bankruptcy proceedings because O. 49 is part of the set of rules within the Rules of Court 2012 that deal with execution proceedings (starting with O. 45), whereas the Bankruptcy Rules are a different set of rules – and yet the Federal Court held that leave is required to issue a bankruptcy notice if the judgment is more than six years old because O. 46 r. 2 of the Rules of Court 2012 says so.

[45] Last but not least, the rules of court must be consistent. Otherwise, an incongruous and anomalous situation could arise whereby a plaintiff, whose application for leave to apply for a writ of seizure and sale after six years has been dismissed by the court for failing to provide sufficient reason, will be at liberty to obtain a garnishee order without requiring leave of court to do so.

[46] For the above reasons, I decided that this court ought to allow the appellant's appeal and set aside the order of the Sessions Court. No order as to costs was made and I had, in open court, encouraged the respondent's counsel to apply for leave to appeal so that a definitive judgment of the Court of Appeal could hopefully be made available on the aforesaid question of law.